



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 26, 1998

Mr. Joe B. Hairston
Walsh, Anderson, Underwood,
Schulze & Aldridge
P.O. Box 2156
Austin, Texas 78768

OR98-1548

Dear Mr. Hairston:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 116096.

The Comal Independent School District (the "district"), which you represent, received a request for information relating to a specific teacher. You state that some of the information has been released. However, you claim that the remaining information is excepted from disclosure under sections 552.103, 552.107, 552.111 and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you contend that the documents in Exhibit B are protected from disclosure by section 552.107.¹ Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* After reviewing Exhibit B,

¹Although you raise the attorney-client privilege under section 552.101, the privilege is properly claimed under section 552.107 of the Government Code. Open Records Decision No. 574 (1990) at 2.

we agree that some of the documents contain client confidences or attorney advice or opinion. We have marked the information in Exhibit B that may be withheld pursuant to section 552.107.

Next, you claim that the documents in Exhibit C may be withheld under section 552.103. Section 552.103(a) of the Government Code excepts from disclosure information relating to litigation to which a governmental body is or may be a party. A governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. In this instance, you have not demonstrated that litigation is pending or reasonably anticipated. *See* Open Records Decision No. 588 (1991); *see also* Open Records Decision No. 647 (1996) (governmental body may raise "attorney work product" privilege under section 552.103 or section 552.111). Thus, the district may not withhold Exhibit C from disclosure pursuant to section 552.103(a).

Next you claim that the documents in Exhibit D are excepted from disclosure under section 552.111. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. After reviewing the documents in Exhibit D, we find that the documents relate solely to a personnel matter and may not be withheld under this exception.

Finally, you contend that some of the requested documents are educational records that must be withheld pursuant to sections 552.026 and 552.114 of the Government Code. Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

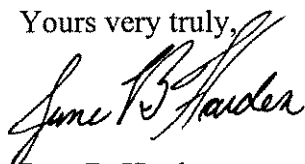
The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). You inform us that, pursuant to FERPA, the district has deemed certain records to be education records and that information containing personally identifiable information regarding students will be redacted. We agree that such information must be withheld pursuant to sections 552.026 and 552.114.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script, appearing to read "June B. Harden".

June B. Harden
Assistant Attorney General
Open Records Division

JBH/cbh

Ref.: ID# 116096

Enclosures: Marked documents

cc: Mr. Mark W. Robinett
Brim, Arnett & Robinett
2525 Wallingwood Drive, Building 14
Austin, Texas 78746
(w/o enclosures)